

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JAMES G. MARTIN,

Petitioner

V.

NO. 1:95CV12-D-D

EDWARD HARGETT, ET AL,

Respondents

O P I N I O N

Petitioner, an inmate at the Mississippi State Penitentiary, files this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. He does not specify what relief he is seeking.

Petitioner is charged with breaking and entering and three counts of aggravated assault. After pleading not guilty he was convicted on October 6, 1993.¹ He was sentenced to 22 years confinement. Petitioner's attorney then apparently filed a "Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial." On September 19, 1994, petitioner filed a pro se "Motion for a New Trial." He states that neither motion has been ruled upon.

¹ It is unclear as to whether he was convicted of some or all of the charges.

Petitioner lists two grounds for relief; denial of appeal and ineffective assistance of counsel.

He contends that he was denied appeal because his attorney, instead of filing notice of appeal, filed a Motion for a New Trial/Judgment Notwithstanding the Verdict. Petitioner filed a complaint with the Mississippi State Bar concerning the attorney's alleged failure to provide him with copies of the trial transcript and appeal briefs. In her response, the attorney stated that she had not done so because a final order denying her motion has not been entered. Until it has been, the court reporter will not transcribe her notes and a transcript is therefore not available. Additionally, she states that she has not been retained to appeal the case.

Petitioner contends that his counsel was ineffective in that she abandoned his self-defense claim, that she took excessive delay before taking any action in his behalf, and she was unable to have the motion for a new trial heard.

After carefully considering the contents of the pro se complaint and giving it the liberal construction required by Haines v. Kerner, 404 U.S. 519 (1972), this court has come to the following conclusion.

It is well settled that a state prisoner seeking habeas corpus relief in federal court is first required to exhaust his available

state remedies. 28 U.S.C. §2254(b) and (c)²; see also Rose v. Lundy, 455 U.S. 509 (1982). More specifically, a petitioner must present his claims to the state courts in such a fashion as to afford those courts a fair opportunity to rule on the merits. Picard v. Conner, 404 U.S. 270 (1971); Dispensa v. Lynaugh, 847 F.2d 211, 217 (5th Cir. 1988). A habeas corpus petitioner must provide the state's highest court with a fair opportunity to pass upon the issues raised in the petition for federal habeas corpus relief. Dupuy v. Butler, 837 F.2d 699, 702 (5th Cir. 1988) (citing Carter v. Estelle, 677 F.2d 427, 443-44 (5th Cir. 1982)).

Petitioner's case is still in the Circuit Court of Alcorn County, with pending motions filed by both his attorney and pro se. Should these motions fail, he may petition the State Supreme Court to

² 28 U.S.C. §2254(b) and (c) provide:

- (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
- (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

appeal his conviction out of time. §99-35-1 Miss. Code Ann. (1993 Supp.) He may also have an available state remedy under the Mississippi Uniform Post Conviction Collateral Relief Act, §99-39-1, et seq., Miss. Code Ann. (1993 Supp.).

After exhausting his available state remedies, petitioner will then be entitled to proceed in the federal district court.

A final judgment in accordance with this opinion will be entered.

THIS the _____ day of _____, 1995.

UNITED STATES DISTRICT JUDGE